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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-76

THE STATE OF SOUTH DAKOTA,

Petitioner,

vs.

DONALD OPPERMAN,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA.

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITIONER, OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC.

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER.

Americans for Effective Law Enforcement, Inc., respectfully move this Court for leave to file a brief, *amicus curiae*, in support of the petitioner in the instant case. This motion is made pursuant to Rule 42 of the Supreme Court Rules. The petitioner has consented to our filing; the respondent has not responded to our request for consent to file. Accordingly, we are moving the Court directly for leave to file. A letter from counsel for the petitioner has been filed with the Clerk of this Court. The interest of the *amicus curiae* and our reasons for desiring to file are set forth below.

INTEREST OF THE AMICUS CURIAE.

Americans for Effective Law Enforcement, Inc. (AELE), is a national, not-for-profit, non-partisan, non-political organization incorporated under the laws of the State of Illinois. As stated in its bylaws, the purposes of AELE are:

1. To explore and consider the needs and requirements for effective enforcement of the criminal law.
2. To inform the public of these needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of law abiding citizens.
3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal laws.

In furtherance of these objectives, AELE seeks to represent in our courts, nationwide, the concern of the average citizen with the problems of crime and of police effectiveness in dealing with crime.

Amicus has as a primary and abiding interest the effectiveness of law enforcement in this country. The instant case presents a question of particular importance to law enforcement agencies and officers throughout the nation involving, as it does, a common and usual police procedure, performed hundreds of times each day across the country. Because this issue also involves a substantial area of potential civil liability on the part of police officers or agencies, *amicus* believes it is of particular importance in defining the permissible extent of daily police activity and is, hence, of particular importance to the entire law enforcement community.

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BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITIONER.

Amicus will not reiterate the legal arguments made by the State of South Dakota in its brief, although we are in full agreement with them and wish to associate ourselves with them. Rather, *amicus* will attempt to analyze the factual questions presented in this case in the context of fundamental considerations which have immediate and important bearing on the everyday performance and effectiveness of law enforcement.

SUMMARY OF FACTS.

This case squarely presents the question of the admissibility of evidence discovered by the police of Vermillion, S. D., during the process of conducting an inventory of the contents of the

respondent's automobile. The particular item in question in this case, less than one ounce of marijuana, was among the contents of the unlocked glove compartment of the car.

The respondent's automobile, which was illegally parked for a period of at least seven hours in a downtown area, was towed away by the Vermillion police, presumably under the authorization of a local ordinance, and it was placed in an impound lot or area. When found, the car was locked and the windows were up. The police instructed the tow-truck operator to enter the car using a tool to unlock it, a procedure that would have been necessary, if for no other reason, than to release the brake or to place the transmission in a neutral position to effectuate the towing process. The acts of towing and impounding the automobile are not at issue in this case, nor is it argued that it was unreasonable to enter the locked vehicle. At the time the car was impounded, in accordance with the established procedure of the Vermillion Police Department, the impounding officer made a full inspection of the exterior of the car and, further, conducted an inventory of contents found within the interior of the car. As a part of the inventory, the officer opened the unlocked glove compartment, inside which the contraband at issue in this case was discovered in plain view in a plastic bag.

It is agreed that the respondent in this case had given no consent for the inventory. Indeed, under the facts stated by the court below, we must assume that the police did not then know where the respondent was. It is possible that they had not yet learned his identity. It is equally agreed that the inventory was conducted in accordance with well-established police policy and that the police had not the slightest reason to believe that the glove compartment of the car or any other part of the car contained the contraband actually discovered or any other form of contraband. Thus it seems clear that the Vermillion police had no probable cause to conduct a search of the interior of respondent's car or its glove compartment.

QUESTION PRESENTED.

This Court, therefore, must decide whether or not the inventory of the contents of a legally impounded automobile, carried out as an established police policy for the purposes of safeguarding the property within the vehicle and for the purpose of protecting the police against potential liability arising out of claims of loss or theft of such property, is a "search" and, if so, whether or not it is "reasonable" within the context of the Fourth Amendment. The Court must also decide, therefore, whether or not evidence of a crime, coming within the plain view of the police during such an inventory, may be admitted as evidence. It is a question which involves the everyday policies, practices, and procedures of police departments everywhere in the United States.

The South Dakota Supreme Court correctly stated that this Court has not decided whether or not an inventory procedure is a "search." *State* v. *Opperman*, 228 N. W. 2d 152, 153. That court however, stated, at 154, that "[l]ogic and well reasoned decisions from other jurisdictions lead us to conclude that an intrusion into a citizen's vechicle as in the instant case is a search." *Amicus* believes that the argument is essentially only one of semantics and that a rule of reason should apply to this question just as we will urge that a rule of reason should apply to the resolution of the issue of whether or not the warrant requirements of the Fourth Amendment must be applied to every such intrusion.

ARGUMENT.

I. The Inventory of the Contents of a Lawfully Impounded Automobile Is a Proper Procedure for the Safeguarding of the Property of the Owner and the Protection of the Police.

There are a number of valid and legitimate reasons for a police officer to impound an automobile and these instances are so numerous and common as to occur many times a day in large

urban areas, and frequently even in smaller population areas. For example, in most police jurisdictions an automobile will be impounded:

1. When the vehicle is subject to forfeiture under state or federal statutes as in certain narcotics, alcoholic beverage or firearms cases.
2. When the vehicle itself constitutes evidence, fruits or the instrumentality of a crime.
3. When the operator of the vehicle has been placed under lawful custodial arrest away from his premises and there is no other responsible individual present and authorized by the operator to assume responsible and lawful custody of the vehicle and its contents.
4. When, by virtue of abandonment, accident, or having been left unattended, the vehicle constitutes a hazard or impediment to traffic.
5. When by reason of intoxication, influence of drugs, illness or injury the operator is unable to drive the vehicle and there is no other person at hand who may assume lawful and responsible custody of the vehicle.
6. When the vehicle itself is in such condition as to be a hazard to traffic.

The foregoing are the standard situations under which vehicles are impounded by various jurisdictions and illustrate that the act of impoundment is not uncommon or unusual. There is a definite probability that the average police officer during his normal working day may be called upon to place a vehicle in police custody, whether by virtue of departmental regulation, municipal ordinance or by the exercise of reasonable prudent judgment. It is clear that in the vast majority of these circumstances, the vehicle and its contents will be returned to the rightful owner. It is therefore incumbent upon police agencies to protect and preserve both the vehicle and its contents for the benefit of the owner and that police officers may be civilly liable for failure to do so.

In *Mozzetti* v. *Superior Court*, 4 Cal. 3d 384, 484 P. 2d 84 (Cal., 1971), relied on heavily by the court below, the

California Supreme Court, in defining the duty owed to Sharon Mozzetti by the police to protect her property, resorted to a discussion of the California law of bailments and suggested that the police were merely "involuntary" or gratuitous bailees, assuming they did not impose a storage charge for the impoundment. That theory may be comforting to the policeman against whom a claim for loss of property is asserted, but to the vast majority of police officers, sworn as they are to protect the lives *and property* of the public, the notion that a police officer owes a portion of the public a degree of care less than owed by a launderer or parking lot attendant is incongruous. Indeed, the working policeman, entrusted, though involuntarily, with the safekeeping of the property of a citizen, is more likely to think of himself as a trustee of that property. *Amicus* would argue that sound public policy demands that police officers, when exercising custodial control, even for a brief period, over the property of private citizens, be held to a greater standard of care than that which would excuse all but gross negligence.

It begs the question to assert, as did the California court in *Mozzetti*, that the police can meet their duty to protect personal property in an impounded automobile "merely by rolling up the windows, locking the vehicle doors and returning the keys to the owner" because "[t]he owner himself, if required to leave his car temporarily, could do no more to protect his property." *Mozzetti* v. *Superior Court, supra,* at 417.

It also begs the question to assert, as did the court below, that the police officer's duty to safeguard the property contained within an impounded vehicle may extend to that which is found on the seats, the floor or the dashboard but somehow magically stops at the latch of an unlocked glove compartment, accessible to anyone by the mere flick of a wrist.

The police, faced with the daily necessity to protect such property, can, should and routinely do, exercise a higher degree of care than that urged in *Mozzetti* and by the South Dakota Supreme Court in the instant case.

In *Mozzetti, supra,* at p. 418, the California Supreme Court drew a subtle inference of police misuse of inventory procedures that was not sustained by the facts of the case. The language of the court is unmistakably clear in its implications:

> *It seems undeniable that a routine police inventory of the contents of an automobile involves a substantial invasion of the privacy of the vehicle owner. Regardless of* professed benevolent purposes *and* euphemistic explanation, *an inventory search involves a thorough* exploration *by the police into the private property of an individual.* (Emphasis added.)

The court further refers to "the prying eyes of the police." These words clearly suggest an improper purpose or, at the very least, a callous indifference to the rights of the citizen. The South Dakota Court in this case is no less suggestive of police subterfuge when it notes that a holding for the state "would lead to the encouragement of *fishing expeditions* and a whittling away of Fourth Amendment protection." (See *State* v. *Opperman, supra,* at 155.)

Yet there is no evidence in *Mozzetti* or in the instant case that would even hint at police impropriety of motive. That the inventory of personal effects left in an impounded vehicle is not, in fact, a probing to discover evidence, fruits or instrumentalities of a crime is, of course, a question of fact to be determined in each specific situation in which the issue is raised. But, as a general police practice, there is a great weight of evidence to indicate that inventories are not done for the purpose or with the intent of evading strict Fourth Amendment requirements.

In July of 1974, a request was sent by *amicus* to the nearly 200 law enforcement agencies that employ legal advisors, asking for statistics on inventories of impounded vehicles. It was learned that only a few departments keep statistical data on the number of inventories made. Only six departments, all varying in size, were able to completely reply to the survey, and the results appear in Table 1. These figures are for the year ended December 31, 1973. *Amicus* does not know of the existence of another survey of this type anywhere at any time.

TABLE I—POLICE INVENTORIES CONDUCTED.

Name of Agency and Jurisdiction	Number of Sworn Officers Employed	Approximate Number of Vehicles Inventoried Per Year	Estimated Number of Inventories Where Evidence Is Found
New York City Police Dept., N.Y.	30,827	20,694	800
Dallas Police Dept., Texas	1,875	38,500	6
Columbus Police Dept., Ohio	1,051	12,000	16
Las Vegas Metro Police Dept., Nev.	693	1,200	204
Metro Dade Co. Dept. of Public Safety, Miami, Fla.	1,464	14,367	359
Springfield Police Dept., Ohio	120	15	5
Total	36,030	86,776	1,390

As can be seen, approximately 86,776 vehicle inventories were conducted annually in the six police agencies listed above, and evidence of another offense (or contraband) was found in an estimated 1,390 of these cases. This is a combined total percentage of 1.6%.

It is therefore apparent, unless these statistics are not representative of the law enforcement community as a whole, that *very few vehicle inventories result in the discovery of other evidence or contraband.*

If it is thought that the police inventory procedures are a "subterfuge" for an otherwise illegal search, it is probably the most inefficient and unproductive trespass on the Fourth Amend-

ment ever conceived of by the police establishment. *Amicus* maintains that police inventory procedures are conducted for proper purposes—to reduce liability for disappearance of personal property and to protect such property for the benefit of vehicle occupants. The statistics gathered in this survey bear out this conclusion.[1]

It is conceded that the uniform application of a police policy or practice performed by all, or nearly all, police agencies will not serve to exempt that practice from constitutional restraints. The mere fact that an inventory is a routine police procedure or that it is "reasonable" in the context of judging everyday human behavior will not, it is likewise conceded, necessarily render the practice "reasonable" within the warrant requirements of the Fourth Amendment.

The fact remains, however, that in carving out exceptions to strict Fourth Amendment warrant requirements, courts *have* applied standards of everyday reasonableness and *have* balanced the need for the exception against the countervailing expectations of privacy. This Court certainly applied a rule of reason in sharply defining the "stop and frisk" exception found in *Terry* v. *Ohio*, 392, U. S. 1 (1968).

How compelling may be the need for a policy requiring officers to conduct inventories of impounded vehicles is a deci-

1. The results were certified by letters received from the legal advisors of each agency. The discrepancy in ratios between the size of the agency and number of vehicles inventoried is largely the result of differences in frequency of the use of impounding procedures. Variances in the ratio of cases where evidence is fortuitously found is probably based on the thoroughness of the inventory procedures utilized in each city. Agencies were asked to give the highest figure in the last category where their estimates were based on a numerical range. The high rate of instances where evidence is found in Las Vegas (and to a lesser extent in the Miami area) is thought to be due to the large number of transient visitors in these communities, who frequently lodge at a motor hotel and often keep items in their vehicles which they would normally put in their homes.

sion usually made at the command level of a police department and is, of course, a subjective judgment, resulting from the close scrutiny given most police policy decisions. In the survey of police departments conducted by *amicus* discussed at pages 8-10 *supra*, a representative of the Chief of Police of Phoenix, Arizona, while unable to furnish sufficient statistical data for inclusion in the survey, discussed that department's policy decision with respect to inventories. In his letter he noted that in 1972 the Arizona Court of Appeals had adopted the restrictive rule of *Mozzetti* v. *Superior Court, supra*, in an Arizona case, *Boulert* v. *Arizona*, 17 Ariz. App. 64, rpt. as *In re One 1965 Econoline Etc.*, 495 P. 2d 504 (Ariz. App., 1972). He then added:

> *Notwithstanding the Court of Appeals decision, the City of Phoenix Police Department decided that civil liability ramifications of not inventorying vehicles outweighed the loss of criminal cases; hence while we were precluded of using evidence found in a criminal prosecution, we continued to inventory automobiles to protect ourselves.*[2]

The judgment of the Phoenix police was fully vindicated by the Arizona Supreme Court which in 1973 reversed the Court of Appeals in the *Econoline* case. The Arizona Supreme Court said:

> *We do not agree with the rationale that while it is reasonable to inventory the vehicle in the first instance for those things which are in clear or plain view, it becomes unreasonable to inventory what is not in plain view. If one of the reasons for conducting the inventory is to safeguard valuables which might be present, it is illogical to prohibit law enforcement officials from searching those areas wherein valuables are most likely to be placed.* In re One 1965 Econoline, Etc., 511 P. 2d 168, 171 (Ariz., 1973).

2. Letter of Mr. Earl Campbell, Police Chief's Office, City of Phoenix Police Department, July 29, 1974. The original of this letter is in the files of Americans for Effective Law Enforcement, Inc.

In the application of the *Econoline* case and its practical effect on police conduct, we find in the action of the Phoenix police, a situation in which the sanctions of the Exclusionary Rule provided no deterrent whatever to a practice found to have been improper, at least for the time, by the Arizona Court of Appeals. *Amicus* cites this example to point out in the most graphic way that the practical, reasonable interests of professional law enforcement agencies, exercised in good faith, do not always lie on the side of prosecutions in situations in which an obligation to the public is felt to outweigh the need to prosecute.

Amicus urges, as suggested by the Arizona Supreme Court, that it is entirely reasonable for the police to conduct an inventory of the contents of a properly impounded vehicle and that it is equally reasonable for them to look into places where items of value will most likely be; in the glove compartment, the trunk or in containers within the car.

In these situations, application by the courts of the Exclusionary Rule serves no deterrent purposes whatsoever.

II. Items Coming Within the Plain View of the Police During the Inventory of the Contents of an Impounded Vehicle Should Be Admissible.

In a line of cases beginning with *Carroll* v. *United States*, 267 U. S. 132 (1925), and culminating with *Cady* v. *Dombrowski*, 413 U. S. 433 (1973), and *Cardwell* v. *Lewis*, ____ U. S. ____, 94 S. Ct. 2464 (1974), courts have held that a different standard of review is applied in automobile cases with respect to dispensing with the presumption that the absence of a warrant makes a search unreasonable.

> *The search of an automobile is far less intrusive on the rights protected by the Fourth Amendment than the search of one's person or of a building.* Almeida-Sanchez v. United States, 413 U.S. 266, 279 (1973), (Powell, J. concurring.) *The Court's previous recognition of the distinction between motor vehicles and dwelling places leads us to conclude that the type of caretaking "search" conducted here of a vehicle that was neither in the custody nor on the premises of its owner and that had been placed where it was by virtue of lawful police action was not unreasonable solely because a warrant had not been obtained.* Cady v. Dombrowsky, 413 U.S. 433, 447-448 (1973). *One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny.* Cardwell v. Lewis, ____, U.S. ____, 94 S.Ct. 2464, 2469, 15 Cr.L. 3163, 3165 (1974).

Given the nearly uniform policies of police agencies in inventorying personal property in impounded autos, in conjunction with their duty to protect personal property, it can be reasonably assumed that there is virtually no expectation of privacy in a vehicle left abandoned or disabled or left by an operator who is unable to drive it. These are situations that lead to the bulk of all impoundments. The status of the impounded vehicle and the legitimate need to inventory its contents are not affected by the fact that the car was impounded only by reason of a parking violation. Indeed, the need to conduct an inventory in the latter case may be of a very high order because, at the outset, the police assume that the property will be returned to the rightful owner.

The South Dakota Supreme Court sought to distinguish the instant case from *Cooper* v. *California*, 386 U. S. 58 (1967), on the grounds that the *Cooper* inventory, found to be reasonable by this Court, was conducted after the automobile had been impounded because of the crime for which Cooper had been arrested and because it was subject to forfeiture. This is, of course, but one of many legitimate reasons for impoundment; yet is it not logical to view an inventory under such circum-

stances as being more nearly a search conducted for the purpose of discovering evidence or contraband than for the more beneficient purpose of safeguarding property which will be returned to the owner? It can hardly be argued that there is a different and lesser expectation of privacy involved in *Cooper* than in the instant case.

The Court below next sought to distinguish *Cady* v. *Dombrowski, supra,* first on the grounds that Dombrowski's automobile constituted a nuisance because it had been rendered inoperable due to an accident and that it could not be moved. Once again, the reason for impoundment is different but that difference is irrelevant to the issue before this Court since the reason for impounding Opperman's car is no less legitimate than that in either *Cooper* or *Cady*. It is merely a *different* reason. The second ground for distinction of the instant case from *Cady* was held to be the reason for the inventory—to search for Dombrowski's revolver, presumed to be in the car, to prevent it from falling into the wrong hands. To be sure, the Vermillion police had no reason to believe that Opperman's car contained any items that might constitute a threat to public safety. They had, indeed, no knowledge of *anything* that was in the car, dangerous, valuable, or otherwise. They could not know whether or not the unlocked and unprotected glove box contained a revolver, a packet of diamonds, or merely old highway maps *until they looked*. But the Court below has held that this dispassionate, neutral looking is unreasonable.

The final, and, as the South Dakota court stated, "perhaps for our purposes most relevant," distinction sought to be made is with *Harris* v. *United States,* 390 U. S. 234 (1968), a case which *amicus* also believes to be most relevant here though for different reasons. *Harris,* we agree, was based squarely upon the "plain view" exception to the warrant requirement. The Court states simply in its brief *per curiam* opinion "Once the door had lawfully been opened, the registration card with the name of the

robbery victim on it, was plainly visible. It has long been settled that objects falling in the plain view of an officer *who has a right to be in the position to have that view* are subject to seizure and may be introduced into evidence." 390 U. S. 234, 236.

Amicus contends that the Vermillion police officer was in a proper position when the evidence in this case came within his view. If, as the court below concedes, the officer had a right to unlock the car with a tool and to remove and inventory articles on the seats, floor or dashboard of the car, to be held for safekeeping and returned to the car owner, is it not a wholly artificial and arbitrary distinction to suggest that they must stop short of an unlocked glove compartment? Does the Court below suggest that the contents of the glove compartment are somehow safer than the contents of the interior of the car? *Amicus* suggests that reason and common sense require the adoption of the language of the Arizona Supreme Court in *Econoline, supra:*

> *We do not agree with the rationale that while it is reasonable to inventory the vehicle in the first instance for those things which are in clear or plain view, it becomes unreasonable to inventory what is not in plain view. If one of the reasons for conducting the inventory is to safeguard valuables which might be present, it is illogical to prohibit law enforcement officials from searching those areas wherein valuables are most likely to be placed.* 511 P.2d 168, 171 (Ariz., 1973).

Amicus argues that the logic of the Arizona Supreme Court is unassailable if the police officer is to properly safeguard the property of the citizens he serves and if he is to be protected against claims for loss of property alleged to be missing from impounded vehicles. Thus, we argue that the police had not just a right but a duty to open the glove compartment for the purpose of inventorying, and hence safeguarding, its unknown contents. Having a right to be in the position he was in, the Vermillion police officer then, under the rule set down in *Harris,* had a right to seize the evidence that came within his plain view.

Harris is a decision predicated upon reason whatever it may or may not say with respect to the usual police practice of conducting inventories of impounded vehicles. The facts of the instant case subject the opinion of the South Dakota Supreme Court, adversely we think, to precisely the same test of reason.

CONCLUSION.

Amicus urges the adoption of a reasonable and proper standard with respect to inventories of the contents of vehicles, namely, that police officers having lawfully taken an automobile into police custody, owe an affirmative duty to the owner of the automobile and its contents, and for their own protection against false or unreasonable claims, to protect the automobile *and its contents* from theft, vandalism or mischief. In furtherance of that duty they have a right, in good faith and without the prior issuance of a warrant, to make an inventory of all personal property contained in the automobile, its glove compartment, its trunk or within containers found therein and that having exercised that duty and right, any items coming within their plain and open view that may subsequently prove to be contraband or the fruits, instrumentalities, or evidence of another crime should, therefore, be admissible.

Amicus urges further that the duty of the police in such cases to protect the property of the public and to protect themselves from the potential liability posed by claims of loss is so substantial as to remove all deterrent effect from the application of the Exclusionary Rule.

Finally, *amicus* urges, whether or not this court accepts the policy arguments set forth above, that the facts of the instant case bring it squarely within the rule of *Harris* v. *United States, supra,* and that therefore the evidence found in the glove compartment of the respondent's impounded car was properly admitted by the trial court.

Accordingly, we ask this court to reverse the judgment of the South Dakota Supreme Court.

Respectfully submitted,

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